BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GERALD W. ROSS	)	
Claimant	)	
VS.	)	
	)	Docket No. 196,104
DAY & ZIMMERMANN, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the Award dated December 12, 1996, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on June 4, 1997.

APPEARANCES

Patrick C. Smith of Pittsburg, Kansas, appeared for the claimant. Jeffry L. Jack of Parsons, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge found claimant had sustained a repetitive trauma injury and found the date of accidental injury to be his last day of work in November 1993. The Administrative Law Judge awarded claimant benefits for a 23.5 percent permanent

partial general disability. Respondent and its insurance carrier requested the Appeals Board to review the issues of (1) claimant's date of accident and (2) the nature and extent of claimant's injury and disability. Those are the only issues before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award should be modified to increase claimant's permanent partial general disability to 51 percent for the period commencing April 1, 1996.

(1) What is claimant's date of accident?

Claimant alleged he developed repetitive trauma injuries, including bilateral carpal tunnel syndrome, as a result of working for the respondent between May 1993 and his last day of work in November 1993. The Administrative Law Judge found claimant's last day of work on or about November 1, 1993, as the appropriate date of accident.

On this appeal, respondent and its insurance carrier contend the decision of Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995) established a bright line rule that the date of accident in repetitive trauma cases is the date of onset of symptoms where the worker does not leave work due to the medical condition. Respondent and its insurance carrier contend claimant left work in November 1993 because of a general layoff rather than his medical condition and, thus, claimant's date of accident under Condon should be May 1993. Based upon that premise, the respondent and its insurance carrier argue claimant's entitlement to permanent partial disability benefits is governed by the formula set forth in K.S.A. 1992 Supp. 44-510e rather than the formula contained in K.S.A. 44-510e.

The Appeals Board finds the respondent's and its insurance carrier's interpretation of Condon is askew. Rather than establishing a bright line rule as suggested, the Appeals Board believes Condon dimmed the bright line rule set forth in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), wherein the Court of Appeals held the last day of work was the appropriate date of accident for bilateral carpal tunnel syndrome which had developed from repetitive trauma. In Condon the Court of Appeals distinguished Berry and held that the date of accident for repetitive trauma injuries is not always the last day worked when the worker leaves work for other than medical reasons. Contrary to the interpretation suggested by the respondent and its insurance carrier, the Condon court did not attempt to devise a new bright line test but, instead, left the fact-finder to determine the appropriate date of accident based upon the facts.

Because claimant continued to perform his regular work duties which required the repetitive and forceful use of the hands between May and November 1993, the Appeals

Board finds it is more probably true than not true that claimant continued to sustain repetitive microtrauma to his upper extremities each and every day he worked as he performed his duties as a change house attendant. The Appeals Board also finds claimant's symptoms progressively worsened as he continued to work for the respondent which is also an indication that claimant was sustaining additional injury up through his last day of employment with the respondent. Therefore, the Appeals Board agrees with the Administrative Law Judge's conclusion that the appropriate date of accident for claimant's repetitive use injury is the last day worked, or on or about November 1, 1993.

(2) What is the nature and extent of claimant's injury and disability?

Because his is an "unscheduled" injury, claimant's entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e which provides in part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

Respondent presented the testimony of Paul W. Toma, D.O., who treated claimant between March and August 1995. Dr. Toma performed bilateral endoscopic carpal tunnel release surgery on claimant on March 17, 1995, and released claimant to return to work without restrictions in April 1995. Dr. Toma indicated claimant had sustained a 10 percent permanent partial functional impairment to the left upper extremity and a 10 percent permanent partial functional impairment to the right. He did not place medical restrictions upon claimant and testified he did not know enough specifics to either agree or disagree with the restrictions formulated by Drs. Abrams and Darnell. He also testified he probably would not place medical restrictions upon claimant without at least obtaining a functional capacities assessment. Dr. Toma was not asked to provide an opinion whether claimant had lost his ability to perform any of his former work tasks.

Claimant presented the testimony of orthopedic surgeon Dale E. Darnell, M.D., whom the Administrative Law Judge selected to perform an independent medical evaluation. Dr. Darnell testified claimant sustained an 18 percent permanent partial functional impairment to the left upper extremity and a 10 percent permanent partial

functional impairment to the right pursuant to the American Medical Association's guides. He reviewed a tasks list prepared by Karen Sherwood and indicated claimant could perform a number of his former work tasks. However, the record is not sufficient to determine the percentage of work tasks the doctor believed claimant could or could not presently perform because it appears the doctor did not review and comment upon all the tasks claimant had performed in the 15-year period before the date of accident.

The Appeals Board notes Dr. Darnell stated claimant has "a 75 percent return to work rate, based upon these four jobs. I think he can do three out of the four." However, such is not the test for permanent partial general disability under K.S.A. 44-510e.

The only physician to provide an opinion regarding the percentage of tasks loss claimant has sustained as a result of his work-related injury after reviewing and considering all of claimant's tasks was Bernard M. Abrams, M.D. In addition to testifying that claimant had a 49 percent whole body functional impairment, Dr. Abrams stated claimant could not do approximately 80 percent of the work tasks claimant performed in the 15-year period preceding the work-related accident. Dr. Abrams' tasks loss opinion is persuasive. Therefore, the Appeals Board finds claimant has lost 80 percent of his ability to perform his former job tasks as contemplated by K.S.A. 44-510e.

As indicated above, claimant last worked for respondent in November 1993. At that time respondent told claimant the company was removing claimant from his change house attendant position and sending him back to production where he had worked years before. Because of the physical problems he was experiencing with his hands, claimant did not believe he could perform the production position and he chose to be laid off instead. Claimant testified the production job would have required him to repetitively take bombs from boxes and place them onto the assembly line. Also, claimant believed the production job would require him to repetitively lift boxes of bombs weighing 75 or 80 pounds. Based upon claimant's uncontroverted testimony and the restrictions recommended by the various physicians, the Appeals Board finds claimant could not perform the production job into which respondent intended to transfer claimant.

The evidentiary record is confusing regarding claimant's post-injury employment history. Much of the confusion was created when counsel represented to claimant at regular hearing that he was released to return to work in April 1994 rather than April 1995.

Despite the above confusion, it appears claimant first obtained work as a dump-truck driver for the Tri-State company during the summer of 1994 and earned $8.25 per hour after he left respondent's employment. Because the work was seasonal, claimant was then laid off. Claimant next worked for the Vantassel company driving a truck and earning either $7.50 or $7.75 per hour. Claimant believes he worked for Vantassel for approximately two months until he left work to have the bilateral carpal tunnel release surgeries. After recuperating from surgery, in April 1995 claimant returned to work for Vantassel for approximately four months until the company was sold and he was laid off.

Next, claimant returned to work for Tri-State for one to three months until he was terminated because he could not shovel. Claimant believes he left Tri-State in August 1995 and obtained employment with Heckert Construction where he worked for approximately two months and was laid off. Claimant believes he began working for Heckert in October 1995.

In April 1996, claimant returned to work for Heckert where he now earns $9.18 per hour, or approximately $367.20 per week. Like Tri-State and Vantassel, Heckert does not provide claimant with insurance or other fringe benefits. Also, like Tri-State and Vantassel, claimant's wages from Heckert do not equal or exceed 90 percent of the average weekly wage he was earning on the date of accident.

Based upon the above, the Appeals Board finds claimant worked for approximately 14 out of the 29 months between his layoff from respondent in November 1993 and his return to work for Heckert Construction in April 1996. For that 29-month period, the Appeals Board also finds claimant had an approximate 66 percent difference in pre- and post-injury average weekly wage up to his return to work for Heckert on or about April 1, 1996. That percentage was derived by estimating claimant's total wages paid between his leaving respondent's employment and his return to work in April 1996 which the Appeals Board finds to be $19,670 and comparing the weekly average of that amount, or $157.74, for that 29-month period to claimant's stipulated $469.82 average weekly wage.

After April 1, 1996, the Appeals Board finds the difference in claimant's pre- and post-injury average weekly wage is approximately 22 percent which is found by comparing claimant's present wage of $367.20 per week to $469.82.

As required by K.S.A. 44-510e, the Appeals Board averages the 80 percent tasks loss and the 66 percent wage difference and finds claimant has a 73 percent permanent partial general disability for the period up to April 1, 1996. Averaging the 80 percent tasks loss and the 22 percent wage difference, the Appeals Board finds a 51 percent permanent partial general disability for the period after April 1, 1996.

The Appeals Board hereby adopts the findings and conclusions set forth by the Administrative Law Judge to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated December 12, 1996, entered by Administrative Law Judge John D. Clark should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gerald W.

Ross, and against the respondent, Day & Zimmermann, Inc., and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred November 1, 1993, and based upon an average weekly wage of $469.82 for 7 weeks of temporary total disability compensation at the rate of $313 per week or $2,191; followed by 125.86 weeks at the rate of $313 per week, or $39,394.18, for a 73% permanent partial general disability for the period November 1, 1993, to April 1, 1996; and for the period commencing April 1, 1996, 186.63 weeks at the rate of $313 per week, or $58,414.82, for a 51% permanent partial general disability, making a total award of $100,000.

As of June 26, 1997, there is due and owing claimant 7 weeks of temporary total disability compensation at the rate of $313 per week or $2,191, followed by 183.43 weeks of permanent partial compensation at the rate of $313 per week in the sum of $57,413.59 for a total of $59,604.59, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $40,395.41 is to be paid for 129.06 weeks at the rate of $313 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts the remaining orders contained in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick C. Smith, Pittsburg, KS
Jeffry L. Jack, Parsons, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director